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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 3, 1973

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 16, 1973 (App. #1, p. 1).

Opinions Below

The first opinion of the Court of Appeals is reported at 417 F.2d 972 (1969) (App. #12, pp. 163a-173a). The second opinion of the Court of Appeals is reported at 432 F.2d 137, 142 (1970), *cert. denied,* 400 U.S. 972 (App. #11, pp. 151a to 162a). The third decision of the Court of Appeals is not yet reported but is listed herein as Appendix Exhibit 9 on pages 142a-144a. The fourth decision appears herein as Appendix #1, p. 1.

The recent opinions of the United States District Court for the Eastern District are unreported. They are listed here as Appendix Exhibit 8, pp. 138a-142a and Appendix Exhibit 10, pp. 145a-150a.[1]

Jurisdiction

The judgment of the Court of Appeals was entered on May 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statute Involved

Section 810 of the Merchant Marine Act, 1936, 49 Stat. 2015, 46 U.S.C. 1227 (App. Ex. 14, p. 197a).

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[1] These decisions are sequals to earlier decisions in Docket 68 C 643 U.S.E.D.N.Y. reported *sub. nom Safir* v. *Gulick,* 297 F. Supp. 630 (E.D.N.Y. 1969), *reversed sub. nom, Safir* v. *Gibson,* 417 F.2d 972 (2d Cir. 1969) and which forms part of this petitioner's appendix in Petition #388—1970 (400 U.S. 972, *cert. denied*).

Question Presented

After an adjudicatory hearing (Docket S 243) mandated by the United States Court of Appeals, the Maritime Subsidy Board, the agency entrusted with the responsibility and endowed with the expertise,[2] has found after exhausting the administrative process that 46 U.S.C. 1227 was violated by all subsidized members of a steamship conference (AGA FBO).[3]

The question is whether the Maritime Administration and Maritime Subsidy Board through the respondent officials are now under a mandatory duty imposed by Section 810 of the Merchant Marine Act 1936, 46 U.S.C. 1227, to invoke the sanction of the Act by recovering all operating differential subsidies paid to these companies during the eleven month period of violation.[4]

Statement of the Case

This case was first brought to this Court by this petitioner three years ago as Petition #388 of the October Term, 1970. At that time the petition was denied based primarily on the prematurity of its posture. "The administrative process, far from being exhausted, had hardly begun." *Mr. Justice Douglas, however, was of the opinion that certiorari should have been granted at that time.* It is no small irony

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[2] Primary responsibility for administration of the Act is vested in the Secretary of Commerce by Reorganization Plan No. 7 of 1961, 75 Stat. 840 and delegated by him to the Maritime Administration and Maritime Subsidy Board, 27 Fed. Reg. 3637 (1962).

[3] Appendix Exhibit A, pp. 15a-87a.

[4] The Secretary of the Maritime Subsidy Board has by certified attachment (See App. Exhibit 5, p. 122a) set forth the amount of these recoveries.

that this Court, during that same term, decided the case on which this petitioner leans heavily to support his contention that the Court of Appeals was in error in granting wider and wider discretion to the Maritime Subsidy Board in a situation where there was specific "law to apply." [5]

The time that has elapsed since then has not wanted for legal activity—in the past three years the following actions took place:

1. In May 1971 after a *"prima facie"* finding by the hearing examiner in S 243 that Sapphire Steamship Lines met all the criteria necessary to qualify for the protection of Section 810, this petitioner moved in United States District Court, Eastern District of New York, for an injunction to prevent payment of $80 million of past subsidies to the violators pending the administrative agency's decision in S 243. Judge John Dooling, in part, granted injunction (App. Ex. 10, pp. 145a-150a). By the time the relief was effective, however, payment of all but $1 million had been paid to the violators.

2. In May, 1972, an "initial" decision by the Hearing Examination (by this time the Chief Administration Law Judge) issued wherein he found that the so-called "Trade Respondents" had violated Section 810 and recommended certain subsidy recoveries he felt within the discretion of the agency to formulate based on the Court of Appeals mandate [6]—albeit 13 months after this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*. This petitioner moved in the District Court for an order requiring the Secretary of Commerce to escrow all amounts payable to

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[5] *Citizens to Preserve Overton Park, Inc.* v. *Volpe* (App. 13, p. 175a).

[6] See, App. Ex. A, pp. 36a-37a, Dated April 16, 1973 as it conflicts with App. Ex. 13, pp. 183a-187a, Dated March 2, 1971.

certain of the violators in the sale of their passenger ships pending a "final" decision by the Maritime Subsidy Board in S 243. Judge Dooling denied the motion (See App. Ex. 8, pp. 138a-141a). Petitioner then appealed to the Second Circuit not only for the escrow of the funds but because his right to participate with the United States in the recoveries was threatened by Judge Dooling's questioning of his standing under 31 U.S.C. 231, 232 (see App. Exs. 6 and 7, pp. 124a-137a).

The Court of Appeals affirmed but left open the question of petitioner's rights under 31 U.S.C. 231, 232. The decision contained a broad implication of a wider discretionary grant to the agency to minimize both the amount of recovery from the violators and to reduce the number of lines in the culpable group.[7]

On April 16, 1973 the final decision of the Maritime Subsidy Board in S 243 was served (App. Ex. A).

The Board found that all respondents violated Section 810 and then exercised the discretion it felt the Court of Appeals had granted by mitigating the penalties to an inconsequential level. Petitioner then on April 27, 1973 moved the Court to set aside the discretionary conclusions 2A through 2F of the decision (see App. Ex. 3, pp. 11a-14a and App. Ex. 2, pp. 2a-3a). The Court of Appeals denied (App. Ex. 1, p. 1) hence this petition.

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[7] App. Exhibit 9, page 143—"The judge's (Dooling), order was well within his discretion; he was not bound to accept plaintiff's assertions that the recoveries will run vastly beyond the sums recommended by the Chief Hearing Examiner in respect of *three* of the *four* ship operator defendants." However, respondent Dawson certified a payment of $149,610,000 in ODS funds during the period of violation (App. Ex. 5, p. 122a). Hearing examiner recommended ODS recovery of only $6,690,000, and this from "trade" defendants only, as he found no violation against "non-trades" (App. Ex. A, p. 19a).

Reason for Granting the Writ

The primary reason is that the Court of Appeals' interpretation of Section 810 in its decision 417 F.2d 972, 1969 and in its decision 432 F.2d 137, 142, 1970, and its decision in Docket 72-1753 unreported, granted broader and broader discretion by word and implication to the Government, and that this discretion so granted is in direct conflict with the decision of the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe, Secretary of Transportation,* decided March 2, 1971 (App. Ex. 13, pp. 183a-186a).

In 417 F.2d 972 (1969) the Court of Appeals granted a measure of discretion to the Administrator under APA 5 U.S.C. 701 *et seq.* by stating that the requirements for the recovery for past subsidies by the Government may be "less absolute" than to cease payment to current violators and followed this in its sequel decision 432 F.2d 137, 142 (1970) wherein it granted wider discretion by stating "nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers participation in the illegal action, should it find these matters relevant to its ultimate decision on *whether* to seek the recovery of subsidies paid during the violation and if so, how much and from whom" (see App. Ex. 11, p. 162a). As has been noted previously Maritime Subsidy Board's discretion was further broadened by implication in its *per curiam* decision in Docket 72-1753 of November 29, 1972.

"Overton" holds that under the Administrative Procedure Act the exception for action committed to agency discretion is only "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'." (See App. Ex. 13, pp. 183a-184a).

Seciton 810 (46 U.S.C. 1227) states in pertinent part:

> "No payment or subsidy of any kind shall be paid directly or indirectly out of the funds of the United States or any agency of the United States to any contractor who shall violate this section."

This language (to paraphrase *Overton*) is a plain and explicit bar to use of federal funds for all subsidy payments for at least the period of violation. At this point it should be noted that the Solicitor General in his brief in opposition to this petitioner's earlier Petiiton for Certiorari #388—1970 stated "the penalty created by Section 810 is *inflexible* as it bars all subsidy payments for at least the period of violation" (see App. Ex. B, p. 98a).

Petitioner agrees to this description and definition but disagrees with the Solicitor General's belief in the Board's discretion to invoke the remedy. In fairness, however, his brief in this case preceded the *Overton* decision by seven months, perhaps this view is no longer held. But, even assuming *arguendo,* the availability of such discretion, by invoking sanctions against five violators in Conclusion #2 (Ex. A, pp. 86a-87a) certainly the *inflexibility* of the sanction demanded full recovery from these contractors in accordance with the definition no longer in conflict.

Petitioner believes, however, that as stated in Exhibit 3, p. 13a "continuing as a party and conforming" was no mere technicality and the remaining (non-trade) violators are ensnared by the fact that the language of the statute is clear as to them and there is law to apply.

Yet, despite the clarity of the statutory language the Second Circuit Court of Appeals created in 417 F.2d 972 (1969) a rationalization for avoiding the hard command of the statute which this Court in *"Overton"* has rejected. Judge Friendly's opinion was based on the premise that the general policy of the Merchant Marine Act 1936 to promote the welfare of the Merchant Marine conflicted with Section

810 and required reconciliation by allowing the Secretary of Commerce to engage in a wide range balancing of competing interests.[8]

But, as is stated in *"Overton"* no such wide ranging endeavor was intended by the statute. If Congress intended general policy factors to be on equal footing with the protection of an unsubsidized American business enterprise from destruction by subsidized American citizens acting in concert there would have been no need for Section 810 at all. This protection was paramount. As Judge Friendly fully recognized in the 1969 opinion "The primary concern manifested by the Congress in the legislative history of 46 U.S.C. 1227 was with the added burden which subsidies imposed on the competitive position of the victim." When these public monies are used to assist some citizens to hurt others in a manner inimicable to the interests of the United States the penalty for the evil at which Section 810 was aimed is explicit and mandatory.

> **"Plainly there is law to apply and thus the exemption for action committed to agency discretion is inapplicable" (*"Overton"*, Ex. 13, p. 186a). The sanction of Section 810 should be invoked in full.**

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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[8] Re Congressional intent see Docket A 17 (Ex. C, pp. 112a-113a).